

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA		DOCKET 4:20-CR-318
VS.		OCTOBER 4, 2022
		9:02 A.M.
KEITH TODD ASHLEY		SHERMAN, TEXAS

VOLUME 7 OF 8, PAGES 1638 THROUGH 1703

REPORTER'S TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE AMOS L. MAZZANT, III,
UNITED STATES DISTRICT JUDGE, AND A JURY

FOR THE GOVERNMENT: HEATHER HARRIS RATTAN
 JAY COMBS
 U.S. ATTORNEY'S OFFICE - PLANO
 101 E. PARK BOULEVARD, SUITE 500
 PLANO, TX 75074

 JASON FINE
 DALLAS COUNTY D.A.'S OFFICE
 133 N. RIVERFRONT BOULEVARD
 DALLAS, TX 75207

FOR THE DEFENDANT: JAMES P. WHALEN
 RYNE THOMAS SANDEL
 WHALEN LAW OFFICE
 9300 JOHN HICKMAN PKWY, SUITE 501
 FRISCO, TX 75035

COURT REPORTER: CHRISTINA L. BICKHAM, CRR, RDR
 FEDERAL OFFICIAL REPORTER
 101 EAST PECAN
 SHERMAN, TX 75090

PROCEEDINGS RECORDED USING MECHANICAL STENOGRAPHY;
TRANSCRIPT PRODUCED VIA COMPUTER-AIDED TRANSCRIPTION.

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1 (Open court, defendant present, jury not present.)

2 THE COURT: It's my understanding there was an
3 issue you wanted to raise before we begin?

4 MR. WHALEN: We did, your Honor. You received the
5 email. We sent it to the Court, copied the government on
6 it and --

7 THE COURT: I did see it, yes.

8 MR. WHALEN: Okay. And so there was a
9 representation made during the closing argument of the
10 government that showed a picture of Mr. Ashley's -- or was
11 his house that showed this pool, and there was comments
12 made that that's where everybody's money went.

13 Looking at the Collin County Appraisal District,
14 that pool was added after he sold the home; so it was
15 extremely misleading to the jury and should be corrected
16 that that is not an accurate representation of his home at
17 the time of the offense that they have alleged was
18 committed.

19 THE COURT: Well, Mr. Whalen, if you had objected,
20 of course, the Court would have said it's up to the jury to
21 decide what the facts of the case are so -- and the Court
22 has instructions in there that indicates what the lawyers
23 say is not evidence. I don't know that any kind of
24 instruction is necessary.

25 MR. WHALEN: Well, I think there is an exhibit --

1 the Google Earth exhibit is in evidence and so -- based on
2 that animation that they did, that came off of that exhibit
3 that's in evidence; and so there is an exhibit in evidence
4 that misrepresents the status of his home at the time of
5 the offense.

6 THE COURT: Okay. So -- well, I thought it was
7 just argument. I didn't realize -- so there is an exhibit
8 that, I guess, was not objected to?

9 MR. WHALEN: I believe there is an exhibit -- I
10 believe it is based off the exhibit that he --

11 THE COURT: I thought it was just a demonstrative.
12 I don't believe it was -- I don't believe it was something
13 that was admitted. So I guess let me ask the government.
14 I thought it was just a demonstrative.

15 MS. RATTAN: I think we offered it for all
16 purposes. It's Government's Exhibit 97 and we offered it
17 yesterday morning or, rather -- anyway, it was offered in
18 Agent Rennie's testimony. It's part of Government's -- or
19 was offered along with Government's Exhibit 134. So it's
20 97.

21 Your Honor, may I be heard while the Court is
22 looking?

23 THE COURT: Yes.

24 MS. RATTAN: Of course, whether it's demonstrative
25 or whether it's actually offered for all purposes, the

1 time, as the Court was pointing out, to make the objection
2 was when it was offered or when it was reviewed with a
3 witness; and that, even then, would go to the weight and
4 not the admissibility.

5 And the cross-examination is, "This isn't
6 accurate" and point out the things that he's pointed out.

7 And certainly he could have objected, as the Court
8 points out, during closing argument as he did twice. Those
9 would be the times to handle those issues.

10 But I do want the Court to know we were not
11 intentionally attempting to misrepresent anything and that
12 was taken from Google Earth and the argument was based on
13 something that was admitted, either for all purposes or
14 demonstrative purposes; and that's fair argument.

15 So he had the opportunity during objecting to the
16 exhibit, cross-examining on the exhibit, or even in his
17 argument. Three separate opportunities to make these
18 points, and they weren't made.

19 THE COURT: Well, if it was just argument and a
20 demonstrative in terms of -- the objection is not waived
21 by -- the objection just has to be made before the case
22 goes to the jury, which hasn't happened yet. It's a
23 different situation if it's a fully admitted exhibit, which
24 is what I'm trying to figure out.

25 97 was, I think, fully admitted. But I don't have

1 it in my book, so I'm trying to --

2 MS. RATTAN: It's the animation, I'm sure the
3 Court knows.

4 THE COURT: No, I understand; but I'm just trying
5 to see the slide that shows the house.

6 Mr. Whalen, what about that? I mean, if it's a
7 fully admitted exhibit --

8 MR. WHALEN: Well, we did lodge objections to the
9 exhibit; so objections were made to the exhibit.

10 THE COURT: But this objection wasn't made.

11 MR. WHALEN: No -- well, here's the point. And
12 maybe, you know, my view of the world is skewed. But I
13 have to believe that when the government -- when they offer
14 exhibits, they review exhibits and in good faith offer them
15 knowing them to be accurate.

16 But we objected to it. They pointed it out. We
17 didn't -- based on what they showed, we didn't see that
18 there was -- going to zoom in on a Google Earth. It showed
19 this animation of it going over, not that they were
20 introducing these Google Earth exhibits that now you can
21 blow up that the jury is just not going to -- whether
22 they're going to be able to do that or not. That's not how
23 it was represented. It's just animation that shows the
24 movement of this, simply that, not the ability to then zoom
25 in on everything based on what they represented the exhibit

1 was.

2 And so to then get up and then zoom in on it and
3 then have the jury have the ability to do that, they can
4 manipulate the exhibit and --

5 THE COURT: Well, I don't think they have the
6 ability back in the jury room, actually. They can play it,
7 but they won't have the ability to zoom in.

8 But, Ms. Rattan, can you show me the slide that is
9 at issue?

10 MS. RATTAN: And what we're going to pull up, your
11 Honor, is the slide from closing?

12 THE COURT: Yes.

13 MS. RATTAN: Okay.

14 THE COURT: Okay. I see that so -- and is that
15 same picture in the admitted Exhibit 97?

16 MS. RATTAN: It was taken off of Exhibit 97, yes,
17 your Honor.

18 THE COURT: But in terms of 97, that's -- the
19 demonstrative you used for closing has been blown up,
20 correct?

21 MS. RATTAN: Well, yes, but I would point out that
22 when we presented 97 with Special Agent Rennie, we
23 specifically paused on this depiction of the house.

24 THE COURT: Okay. So, Ms. Rattan, of course, I'm
25 not sure -- well, Mr. Whalen, I guess, I should address.

1 I'm not sure what you want the Court to do. I
2 mean, this exhibit has been fully admitted. The fact that
3 the pool wasn't -- I mean, the record is closed so it's
4 part of the record and it's been admitted. The objection
5 you made had nothing to do regarding it was inaccurate
6 so -- in terms of the timing. It is an accurate depiction
7 of the house, I guess, when it was taken. The fact that
8 the pool wasn't done until after all this happened -- I
9 don't know what you want me to do about that.

10 MR. WHALEN: Well, your Honor, I think what we
11 would like you to do is that the jury be instructed that
12 that was not a representation of his house at the time the
13 offense was alleged to have been committed.

14 THE COURT: And my question is why should I do
15 that when you've never raised that in a timely manner?

16 MR. WHALEN: Well, because --

17 THE COURT: And this was admitted as an exhibit.

18 MR. WHALEN: Well, it was -- one, it was not part
19 of the exhibit. The exhibit was simply an overview of
20 showing his travel from -- the phone's travel from his
21 house to there. It never zoomed in on any particular
22 objects or anything like that.

23 THE COURT: So what you're saying is this picture
24 is not part of the -- so the jury --

25 MR. WHALEN: Not the way they presented it to the

1 jury. And so they would have presented it to the jury on
2 the animation, it didn't zoom in and say, okay, this was
3 the start part and let's go from --

4 THE COURT: Okay. I guess let me clear it up with
5 the government. Is this slide part of 97?

6 MS. RATTAN: Yes, your Honor, it is.

7 THE COURT: Okay.

8 MS. RATTAN: And I would also say that when we
9 played 97 with Agent Rennie, we specifically paused on the
10 scene that depicts the defendant's house.

11 THE COURT: Okay. Well -- and so what does the
12 government want? This is your record to protect on appeal,
13 so you tell me.

14 MS. RATTAN: We think the record is fine, your
15 Honor. The defendant had ample, multiple opportunities to
16 make these objections when it was offered. No
17 cross-examination and then nothing in closing argument
18 after Mr. Combs made the argument.

19 The other thing is the estate is accurate. The
20 fact that there is a pool there that the defendant is
21 saying Collin County records show was placed there after he
22 moved out is really *de minimis* because, as we can all see,
23 it's a large estate and a large house.

24 THE COURT: Okay. Well, I'm going to overrule the
25 objection so --

1 MR. WHALEN: All right. And, your Honor, just so
2 the record is clear, we're objecting to that and we are
3 objecting because it does deny him a right to a fair trial
4 under the Sixth Amendment and we would object on those --

5 THE COURT: There is no basis for that in any way,
6 but I understand you want to make your objection.

7 Again, you had the ability to object to this both
8 when the exhibit was offered as -- and you didn't as to
9 this basis and -- plus, in my view, it is an accurate
10 depiction of the house. So the fact that the pool wasn't
11 put in until 2021, in my view, is -- was that the correct
12 date, 2021?

13 MR. WHALEN: Yes.

14 THE COURT: Okay. But I just don't see an issue
15 here so -- it's really a minor issue in the scheme of
16 things of the case, so I'm going to overrule your
17 objection.

18 Anything else?

19 MR. WHALEN: Yes, your Honor. Could we make the
20 attachment to the email I sent to the Court a part of the
21 record as well as the government's slide as part of the
22 record, please. And I can print it out if I need to but --

23 THE COURT: Well, print the email out; and we can
24 certainly make that part of the record, if you so desire.

25 I don't know if they can print the page from the

1 slides. And actually probably you're going to provide us a
2 copy of all of the slides anyway, aren't you, as part of
3 the record since it's part --

4 MS. RATTAN: Yes.

5 THE COURT: It's not part of the evidence record,
6 but it's part of what the jury got to see as a
7 demonstrative so they'll have -- that will be part of the
8 record --

9 MR. WHALEN: All right. Thank you, your Honor.

10 THE COURT: -- for appeal purposes.

11 Okay. Anything from the government?

12 MS. RATTAN: No, your Honor.

13 THE COURT: Okay. Let's bring the jury in.

14 (The jury enters the courtroom, 9:13 a.m.)

15 THE COURT: Okay. Please be seated.

16 Welcome back, ladies and gentlemen. I'm going to
17 have my lawyer give you each a copy of the
18 Court's instructions. The law requires me to read these in
19 open court, but you will have a copy to follow along and
20 take back with you when you begin deliberations.

21 Members of the jury, now that you have heard all
22 the evidence in this case, it becomes my duty to give you
23 the instructions of the Court as to the law applicable to
24 this case.

25 In any jury trial there are, in effect, two

1 judges. I am one of the judges; the other is you, the
2 jury. It is my duty to preside over the trial and to
3 determine what testimony and evidence is proper for your
4 consideration. It is also my duty at the end of the trial
5 to explain to you the rules of law that you must follow and
6 apply in arriving at your verdict.

7 First, I will give you some general instructions
8 which apply in every case, for example, instructions about
9 the burden of proof and how to judge the believability of
10 the witnesses. Then I will give you some specific rules of
11 law about this particular case, and finally I will explain
12 to you the procedures you should follow in your
13 deliberations.

14 You, as jurors, are the judges of the facts. But
15 in determining what actually happened -- that is, in
16 reaching your decision as to the facts -- it is your sworn
17 duty to follow all the rules of law as I explain them to
18 you.

19 You have no right to disregard or give special
20 attention to any one instruction or to question the wisdom
21 or correctness of any rule that I may state to you. You
22 must not substitute or follow your own notion or opinion as
23 to what the law is or ought to be. It is your duty to
24 apply the law as I explain it to you, regardless of the
25 consequences.

1 It is also your duty to base your verdict solely
2 upon the evidence, without prejudice or sympathy. That was
3 the promise you made and the oath you took before being
4 accepted by the parties as jurors, and they have the right
5 to expect nothing less.

6 The Indictment or formal charge against a
7 defendant is not evidence of guilt. Indeed, the defendant
8 is presumed by the law to be innocent. The defendant
9 begins with a clean slate. The law does not require a
10 defendant to prove his innocence or to produce any evidence
11 at all, and no inference whatever may be drawn from the
12 election of the defendant not to testify.

13 The government has the burden of proving the
14 defendant guilty beyond a reasonable doubt; and if it fails
15 to do so, you must acquit the defendant. While the
16 government's burden of proof is a strict or heavy burden,
17 it is not necessary that the defendant's guilt be proved
18 beyond all possible doubt. It is only required that the
19 government's proof exclude any reasonable doubt concerning
20 the defendant's guilt.

21 A reasonable doubt is a doubt based upon reason
22 and common sense after careful and impartial consideration
23 of all the evidence in the case. Proof beyond a reasonable
24 doubt, therefore, is proof of such a convincing character
25 that you would be willing to rely and act upon it without

1 hesitation in making the most important decisions of your
2 own affairs.

3 Now, as I told you earlier, it is your duty to
4 determine the facts. To do so, you must consider only the
5 evidence presented during the trial. Evidence is the sworn
6 testimony of the witnesses, including stipulations, and the
7 exhibits. The questions, statements, objections, and
8 arguments made by the lawyers are not evidence.

9 The function of the lawyers is to point out those
10 things that are most significant or most helpful to their
11 side of the case and, in doing so, to call your attention
12 to certain facts or inferences that might otherwise escape
13 your notice. In the final analysis, however, it is your
14 own recollection and interpretation of the evidence that
15 controls in the case. What the lawyers say is not binding
16 upon you.

17 Now, during the trial I sustained objections to
18 certain questions or exhibits. You must disregard those
19 questions and exhibits entirely. Do not speculate as to
20 what the witness would have said if permitted to answer the
21 question or as to the contents of an exhibit. Your verdict
22 must be based solely on the legally admissible evidence and
23 testimony.

24 Also, do not assume from anything that I have done
25 or said during the trial that I have an opinion concerning

1 any of the issues in this case. Except for the
2 instructions to you on the law, you should disregard
3 anything that I have said during the trial in arriving at
4 your verdict.

5 Now, in considering the evidence, you are
6 permitted to draw such reasonable inferences from the
7 testimony and exhibits as you feel are justified in the
8 light of common experience. In other words, you may make
9 deductions and reach conclusions that reason and common
10 sense lead you to draw from the facts which have been
11 established by the evidence.

12 Do not be concerned about whether evidence is
13 direct evidence or circumstantial evidence. You should
14 consider and weigh all of the evidence that was presented
15 to you.

16 Direct evidence is the testimony of one who
17 asserts actual knowledge of a fact, such as an eyewitness.
18 Circumstantial evidence is proof of a chain of events and
19 circumstances indicating that something is, or is not, a
20 fact.

21 The law makes no distinction between the weight
22 you may give to either direct or circumstantial evidence;
23 but the law requires that you, after weighing all of the
24 evidence, whether direct or circumstantial, be convinced of
25 the guilt of the defendant beyond a reasonable doubt before

1 you can find him guilty.

2 I remind you that it is your job to decide whether
3 the government has proved the guilt of the defendant beyond
4 a reasonable doubt. In doing so, you must consider all of
5 the evidence. This does not mean, however, that you must
6 accept all of the evidence as true or accurate.

7 You are the sole judges of the credibility or
8 believability of each witness and the weight to be given to
9 the witness' testimony. An important part of your job will
10 be making judgments about the testimony of the witnesses
11 who testified in this case. You should decide whether you
12 believe all, some part, or none of what each person had to
13 say and how important that testimony was. In making that
14 decision, I suggest you ask yourself a few questions:

15 Did the witness impress you as honest?

16 Did the witness have any particular reason not to
17 tell the truth?

18 Did the witness have a personal interest in the
19 outcome of the case?

20 Did the witness have any relationship with either
21 the government or the defense?

22 Did the witness seem to have a good memory?

23 Did the witness clearly see or hear the things
24 about which he or she testified?

25 Did the witness have the opportunity and ability

1 to understand the questions clearly and answer them
2 directly?

3 Did the witness' testimony differ from the
4 testimony of other witnesses?

5 These are a few of the considerations that will
6 help you determine the accuracy of what each witness said.

7 Your job is to think about the testimony of each
8 witness you have heard and decide how much you believe of
9 what each witness had to say. In making up your mind and
10 reaching a verdict, do not make any decisions simply
11 because there were more witnesses on one side than on the
12 other. Do not reach a conclusion on a particular point
13 just because there were more witnesses testifying for one
14 side on that point. You will always bear in mind that the
15 law never imposes upon a defendant in a criminal case the
16 burden or duty of calling any witnesses or producing any
17 evidence.

18 The defendant has an absolute right not to
19 testify. The fact that a defendant does not testify should
20 not be considered by you in any way or even discussed in
21 your deliberations. I remind you that it is up to the
22 government to prove the defendant's guilt beyond a
23 reasonable doubt. It is not up to the defendant to prove
24 that he is not guilty.

25 Now, the testimony of a witness may be discredited

1 by showing that the witness testified falsely or by
2 evidence that at some other time the witness said or did
3 something, or failed to say or do something, which was
4 inconsistent with the testimony the witness gave at trial.

5 Earlier statements of a witness were not admitted
6 in evidence to prove that the contents of those statements
7 are true. You may not consider the earlier statements to
8 prove that the content of an earlier statement is true; you
9 may only use earlier statements to determine whether you
10 think the earlier statements are consistent or inconsistent
11 with the trial testimony of the witness and, therefore,
12 whether they affect the credibility of that witness.

13 If you believe that a witness has been discredited
14 in this manner, it is your exclusive right to give the
15 testimony of that witness whatever weight you think it
16 deserves.

17 Now, during the trial you heard the testimony of
18 witnesses who were presented to you as an expert in a
19 certain field. If scientific, technical, or other
20 specialized knowledge might assist the jury in
21 understanding the evidence or in determining a fact in
22 issue, a witness qualified by knowledge, skill, experience,
23 training, or education may testify and state an opinion
24 concerning such matters.

25 Merely because such a witness has expressed an

1 opinion does not mean, however, that you must accept this
2 opinion. You should judge such testimony like any other
3 testimony. You may accept it or reject it and give it as
4 much weight as you think it deserves, considering the
5 witness' education and experience, the soundness of the
6 reasons given for the opinion, and all other evidence in
7 the case.

8 You will note that the Fourth Superseding
9 Indictment charges that the offense was committed on or
10 about a specified date or during a specific period of time.
11 The government does not have to prove that the crime was
12 committed on those exact dates so long as the government
13 proves beyond a reasonable doubt that the defendant
14 committed the crime on a date reasonably near the dates
15 stated in the Fourth Superseding Indictment for each count.

16 You are here to decide whether the government has
17 proved beyond a reasonable doubt that the defendant is
18 guilty of the crime charged. The defendant is not on trial
19 for any act, conduct, or offense not alleged in the Fourth
20 Superseding Indictment. Neither are you called upon to
21 return a verdict as to the guilt of any other person or
22 persons not on trial as a defendant in this case except as
23 you are otherwise instructed.

24 Now, if the defendant is found guilty, it will be
25 my duty to decide what the punishment will be. You should

1 not be concerned with punishment in any way. It should not
2 enter your consideration or discussion.

3 A separate crime is charged in each count of the
4 Fourth Superseding Indictment. Each count, and the
5 evidence pertaining to it, should be considered separately.
6 The fact that you might find the defendant guilty or not
7 guilty as to one of the crimes charged should not control
8 your verdict as to any other count.

9 You have heard evidence of acts of the defendant
10 which may be similar to those charged in the Indictment but
11 which were committed on other occasions. You must not
12 consider any of this evidence in deciding if the defendant
13 committed the acts charged in the Indictment. However, you
14 may consider the evidence for other, very limited purposes.

15 If you find beyond a reasonable doubt from other
16 evidence in this case that the defendant did commit the
17 acts charged in the Indictment, then you may consider
18 evidence of similar acts allegedly committed on other
19 occasions to determine:

20 One, whether the defendant had the state of mind
21 or intent necessary to commit the crime charged in the
22 Fourth Superseding Indictment; or,

23 Two, whether the defendant had the motive or the
24 opportunity to commit the acts charged in the Indictment;
25 or,

1 Three, whether the defendant acted according to a
2 plan or in preparation for commission of a crime; or,

3 Four, whether the defendant committed the acts for
4 which he is on trial by accident or mistake.

5 These are the limited purposes for which any
6 evidence of other similar acts may be considered.

7 Now, some exhibits have been identified as
8 typewritten transcripts of oral conversations which can be
9 heard on tape recordings received in evidence. The
10 transcripts also purport to identify the speakers engaged
11 in such conversations.

12 I have admitted the transcript for the limited and
13 secondary purpose of aiding you in following the content of
14 the conversation as you listen to the tape recording and to
15 also aid you in identifying the speakers.

16 You are specifically instructed that whether the
17 transcript correctly, or incorrectly, reflects the content
18 of the conversation or the identity of the speakers is
19 entirely for you to determine based upon your own
20 evaluation of the testimony you have heard concerning the
21 preparation of the transcript and from your own examination
22 of the transcript in relation to your hearing of the tape
23 recording itself as the primary evidence of its own
24 contents; and if you should determine that the transcript
25 in any respect is incorrect or unreliable, you should

1 disregard it to that extent. It is what you hear on the
2 tape that is evidence, not the transcripts.

3 Now, certain charts and summaries have been shown
4 to you solely as an aid to help you explain the facts
5 disclosed by the evidence, which is the testimony, books,
6 records, and other documents in the case. These charts and
7 summaries are not admitted evidence or proof of any facts.
8 You should determine the facts from the evidence that has
9 been admitted.

10 Now, certain charts and summaries of other records
11 have been received into evidence. They should be
12 considered like any other evidence in the case. You should
13 give them only such weight as you think they deserve.

14 The charts and summaries include inferences or
15 conclusions drawn from the records underlying them. It is
16 up to you to determine if these inferences or conclusions
17 are accurate.

18 Summary testimony by a witness and charts or
19 summaries prepared or relied upon by the witness have been
20 received into evidence for the purpose of explaining facts
21 disclosed by testimony and exhibits which are also in
22 evidence in this case.

23 If you find that such summary testimony and charts
24 correctly reflect the other evidence the case, you may rely
25 upon them. But if and to the extent that you find they are

1 not in truth summaries of the evidence in the case, you are
2 to disregard them. The best evidence of what occurred are
3 the underlying records themselves.

4 As used in these instructions, a representation,
5 statement, or pretense is "material" if it has a natural
6 tendency to influence, or is capable of influencing, the
7 decision of the person to which it is addressed. The
8 government may prove materiality in either of two ways.

9 First, a representation, statement, or pretense is
10 "material" if a reasonable person would attach importance
11 to its existence or nonexistence in determining his or her
12 choice of action in the transaction in question.

13 Second, a statement could be material, even though
14 only an unreasonable person would rely upon it, if the
15 person who made the statement knew or had reason to know
16 his victim was likely to rely upon it.

17 In determining materiality, you should consider
18 that naivety, carelessness, negligence, or stupidity of the
19 victim does not excuse criminal conduct, if any, on the
20 part of the defendant.

21 The word "knowingly," as that term has been used
22 from time to time in these instructions, means that the act
23 was done voluntarily and intentionally, not because of
24 mistake or accident.

25 In this case the defendant is charged with

1 multiple offenses called "counts," for wire fraud, mail
2 fraud, possessing or carrying a firearm during commission
3 of a crime of violence, and bank theft. A current copy of
4 the Fourth Superseding Indictment will be provided to you
5 for deliberations.

6 So Counts 1 through 6, 9 through 14, and 20, wire
7 fraud, 18 USC, Section 1343.

8 The defendant is charged in Counts 1 through 6, 9
9 through 14, and 20 of the Fourth Superseding Indictment
10 with the offense of wire fraud under Title 18 United States
11 Code, Section 1343, which makes it a crime for anyone to
12 use interstate wire communications in carrying out a scheme
13 to defraud.

14 For you to find the defendant guilty of this
15 crime -- of these crimes for these various counts, you must
16 be convinced that the government proved each of the
17 following beyond a reasonable doubt:

18 First, that the defendant knowingly devised or
19 intended to devise any scheme to defraud. The scheme
20 charged in this case is a scheme in which the defendant
21 solicited money from victim investors for the purported
22 investments, when in reality the funds were used for
23 personal enrichment;

24 Second, that the scheme to defraud employed false
25 material representations or false material pretenses;

1 Third, that the defendant transmitted or caused to
2 be transmitted by way of wire communications, in interstate
3 commerce, any writing, sign, signal, picture, or sound for
4 the purpose of executing such scheme; and,

5 Fourth, that the defendant acted with a specific
6 intent to defraud.

7 Attempted wire fraud under 18 USC, Section 1349.

8 The government can prove Counts 1 through 6, 9
9 through 14, and 20 by showing beyond a reasonable doubt
10 that the defendant did or did "attempt" to commit the
11 offense. It is a crime for anyone to attempt to commit a
12 violation of certain specified laws of the United States.
13 In this case defendant is charged in Counts 1 through 6, 9
14 through 14, and 20 of the Fourth Superseding Indictment
15 with attempting to commit wire fraud under Title 18 United
16 States Code, Section 1349.

17 For you to find the defendant guilty of attempting
18 to commit wire fraud, you must be convinced that the
19 government has proved each of the following beyond a
20 reasonable doubt:

21 First, that the defendant intended to commit wire
22 fraud; and,

23 Second, that the defendant did an act that
24 constitutes a substantial step towards the commission of
25 that crime and that strongly corroborates the defendant's

1 criminal intent and amounts to more than mere preparation.

2 Now, your verdict, whether it is guilty or not
3 guilty, must be unanimous. The following instruction
4 applies to the unanimity requirement as to Counts 1 through
5 6, 9 through 14, and 20.

6 Counts 1 through 6, 9 through 14, and 20 of the
7 Fourth Superseding Indictment charge the defendant with
8 committing the crime of wire fraud in two ways.

9 The first is the defendant committed wire fraud.

10 The second is the defendant attempted to commit
11 wire fraud.

12 The government does not have to prove both of
13 these for you to return a guilty verdict on Counts 1
14 through 6, 9 through 14, and Count 20. But in order to
15 return a guilty verdict, all of you must agree that the
16 same one has been proved. All of you must agree that the
17 government proved beyond a reasonable doubt that the
18 defendant committed wire fraud, or all of you must agree
19 that the government proved beyond a reasonable doubt that
20 the defendant attempted to commit wire fraud.

21 Now, you should use the following instructions and
22 definitions in your deliberations on Counts 1 through 6, 9
23 through 14, and 20.

24 A "scheme to defraud" means any plan, pattern, or
25 course of action intended to deprive another of money or

1 property or bring about some financial gain to the person
2 engaged in the scheme.

3 A "specific intent to defraud" means a conscious,
4 knowing intent to deceive or cheat someone.

5 A representation or pretense is "false" if it is
6 known to be untrue or is made with reckless indifference to
7 its truth or falsity. A representation or pretense would
8 also be "false" if it constitutes a half-truth or
9 effectively omits or conceals a material fact, provided it
10 is made with the intent to defraud.

11 A representation or pretense is "material" if it
12 has a natural tendency to influence or is capable of
13 influencing the decision of the person or entity to which
14 it is addressed.

15 "Interstate commerce" means commerce or travel
16 between one state, territory, or possession of the United
17 States and another state, territory, or possession of the
18 United States, including the District of Columbia.

19 It is not necessary that the government prove all
20 of the details alleged in the Indictment concerning the
21 precise nature and purpose of the scheme. What must be
22 proved beyond a reasonable doubt is that the defendant
23 knowingly devised or intended to devise a scheme to defraud
24 by means of false or fraudulent pretenses or
25 representations that were substantially the same as the one

1 alleged in the Indictment.

2 It is also not necessary that the government prove
3 that the material transmitted by wire communications was
4 itself false or fraudulent or that the use of the
5 interstate wire communications facilities was intended as
6 the specific or exclusive means of accomplishing the
7 alleged fraud. What must be proved beyond a reasonable
8 doubt is that the use of the interstate wire communications
9 facilities was closely related to the scheme between the
10 defendant -- scheme because the defendant either wired
11 something or caused it to be wired in interstate commerce
12 in an attempt to execute or carry out the scheme.

13 The alleged scheme need not actually succeed in
14 defrauding anyone.

15 To "cause" interstate wire communications
16 facilities to be used is to do an act with knowledge that
17 the use of the wire communications facilities will follow
18 in the ordinary course of business or where such use can
19 reasonably be foreseen.

20 Each separate use of interstate wire
21 communications facilities in furtherance of a scheme to
22 defraud by means of false or fraudulent pretenses or false
23 or fraudulent representations constitutes a separate
24 offense.

25 Should you find the defendant guilty to any of

1 Counts 1 through 6 in Fourth Superseding Indictment, you
2 will then need to determine if the wire fraud affected a
3 financial institution.

4 The term "financial institution" means federally
5 insured depository institutions.

6 A "financial institution" is affected when there
7 is an increased risk of loss caused by the fraudulent
8 scheme. This remains true even if the "financial
9 institution" suffered no loss -- the increased risk of loss
10 is sufficient.

11 Counts 15 through 16, mail fraud, 18 United States
12 Code, Section 1341.

13 The defendant is charged in Counts 15 and 16 of
14 the Fourth Superseding Indictment with the offense of mail
15 fraud under Title 18 United States Code, Section 1341,
16 which makes it a crime for anyone to use the mails,
17 including any private or commercial interstate carrier, in
18 carrying out a scheme to defraud.

19 For you to find the defendant guilty of these
20 crimes, you must be convinced that the government proved
21 each of the following beyond a reasonable doubt for each
22 count:

23 First, that the defendant knowingly devised or
24 intended to devise a scheme to defraud. Here, the
25 defendant is charged with a scheme to obtain money by means

1 of false and fraudulent pretenses and representations;

2 Second, that the scheme to defraud employed false
3 material representations or false material pretenses;

4 Third, that the defendant mailed something or
5 caused something to be sent and/or delivered through the
6 U.S. Postal Service or a private or commercial interstate
7 carrier for the purpose of executing such scheme or
8 attempting to do so; and,

9 Fourth, that the defendant acted with a specific
10 intent to defraud.

11 The government can prove Counts 15 and 16 by
12 showing beyond a reasonable doubt that the defendant did or
13 did "attempt" to commit the offense. It is a crime for
14 anyone to attempt to commit a violation of certain
15 specified laws of the United States. In this case the
16 defendant is charged in Counts 15 and 16 of the Fourth
17 Superseding Indictment with attempting to commit mail fraud
18 under Title 18 United States Code, Section 1349. For you
19 to find the defendant guilty of attempting to commit wire
20 fraud -- mail fraud, excuse me -- you must be convinced
21 that the government has proved each of the following beyond
22 a reasonable doubt:

23 First, that the defendant intended to commit mail
24 fraud; and,

25 Second, that the defendant did an act that

1 constitutes a substantial step towards the commission of
2 that crime and that strongly corroborates the defendant's
3 criminal intent and amounts to more than mere preparation.

4 Your verdict, whether it is guilty or not guilty,
5 must be unanimous. The following instruction applies to
6 the unanimity requirement as to Counts 15 and 16.

7 Counts 15 and 16 of the Fourth Superseding
8 Indictment charge the defendant with committing the crime
9 of mail fraud in two ways.

10 The first is that the defendant committed mail
11 fraud.

12 The second is that the defendant attempted to
13 commit mail fraud.

14 The government does not have to prove both of
15 these for you to return a guilty verdict on Counts 15 and
16 16; but in order to return a guilty verdict, all of you
17 must agree that the same one has been proved.

18 All of you must agree that the government proved
19 beyond a reasonable doubt that the defendant committed mail
20 fraud, or all of you must agree that the government proved
21 beyond a reasonable doubt that the defendant attempted to
22 commit mail fraud.

23 You should use the following instructions and
24 definitions in your deliberations on Counts 15 and 16.

25 A "scheme to defraud" means any plan, pattern, or

1 course of action intended to deprive another of property or
2 money or bring about some financial gain to the person
3 engaged in the scheme.

4 A "specific intent to defraud" means a conscious,
5 knowing intent to deceive or cheat someone.

6 A representation or pretense is "false" if it is
7 known to be untrue or is made with reckless indifference as
8 to the truth or falsity. A representation or pretense
9 would also be "false" if it constitutes a half-truth or
10 effectively omits or conceals a material fact provided it
11 is made with the intended to defraud.

12 A representation or pretense is "material" if it
13 has a natural tendency to influence or is capable of
14 influencing the decision of the person or entity to which
15 it is addressed.

16 "Interstate commerce" means commerce or travel
17 between one state, territory, or possession of the United
18 States and another state, territory, or possession of the
19 United States, including the District of Columbia.

20 It is not necessary that the government prove all
21 of the details alleged in the Indictment concerning the
22 precise nature and purpose of the scheme. What must be
23 proved beyond a reasonable doubt is that the defendant
24 knowingly devised or intended to devise a scheme to defraud
25 by means of false or fraudulent pretenses or

1 representations that was substantially the same as the one
2 alleged in the Indictment.

3 It is also not necessary that the government prove
4 that the mailed material or material sent by private or
5 commercial interstate carrier was itself false or
6 fraudulent or that the use of the mail or a private or
7 commercial interstate carrier was intended as the specific
8 or exclusive means of accomplishing the alleged fraud.

9 What must be proved beyond a reasonable doubt is
10 that the use of the mails, including the use of private or
11 commercial interstate carriers, was closely related to the
12 scheme because the defendant either mailed something or
13 caused it to be mailed or the defendant either sent or
14 delivered something or caused it to be sent or delivered by
15 a private or commercial interstate carrier in an attempt to
16 execute or carry out the scheme.

17 The alleged scheme need not actually have
18 succeeded in defrauding anyone.

19 To "cause" the mails or private or commercial
20 interstate carrier to be used is to do an act with
21 knowledge that the use of the mails, including the use of a
22 private or commercial interstate carrier, will follow in
23 the ordinary course of business or where such use can
24 reasonably be foreseen even though the defendant did not
25 intend or request the mails, including a private or

1 commercial interstate carrier, to be used.

2 Each separate use of the mails, including the use
3 of a private or commercial interstate carrier, in
4 furtherance of a scheme to defraud by means of false or
5 fraudulent pretenses or false or fraudulent representations
6 constitutes a separate offense.

7 Count 18, possessing or carrying a firearm during
8 the commission of a crime of violence, 18 United States
9 Code, Section 924(c)(1) and (j).

10 The defendant is charged in Count 18 of the Fourth
11 Superseding Indictment with the offense of carrying or
12 discharging a firearm during a crime of violence or
13 possession of a firearm in furtherance of a crime of
14 violence causing death or murder by robbery under Title 18
15 United States Code, Sections 924(c)(1) and (j).

16 Title 18 United States Code, Section 924(c)(1)
17 makes it a crime for anyone to knowingly carry a firearm
18 during and in relation to a crime of violence or to
19 knowingly possess a firearm in furtherance of a crime of
20 violence.

21 For you to find the defendant guilty of this crime
22 under Section 924(c)(1), you must be convinced that the
23 government proved each of the following beyond a reasonable
24 doubt:

25 First, that the defendant committed the crime of

1 affecting commerce by robbery, in violation of 18 United
2 States Code, Section 1951(a), as set forth in the
3 subsection titled "D, Affecting Commerce by Robbery,
4 18 USC, Section 1951, Hobbs Act," on pages 26 through 29 of
5 these instructions. I instruct you that affecting commerce
6 by robbery is a crime of violence; and,

7 Second, that the defendant knowingly carried a
8 firearm during and in relation to the defendant's
9 commission of the crime of affecting commerce by robbery,
10 or that the defendant knowingly possessed a firearm and
11 that possession was in furtherance of the defendant's
12 commission of the crime of affecting commerce by robbery.

13 The events presented at trial happened in various
14 places. You are hereby instructed that when an offense is
15 begun in one district and completed in another, venue is
16 proper in any district in which the offense was begun,
17 continued, or completed.

18 In order for you to return a guilty verdict, the
19 government must prove by a preponderance of the evidence
20 that the offense began, continued, or was completed in the
21 Eastern District of Texas. This is a fact that the
22 government has to prove only by a preponderance of the
23 evidence, which means that it is more likely than not so.
24 All of the other elements of the offense must be proved
25 beyond a reasonable doubt.

1 You should use the following instructions and
2 definitions in your deliberations regarding carrying or
3 discharging a firearm during a crime of violence or
4 possession of a firearm in furtherance of a crime of
5 violence under Title 18 United States Code,
6 Section 924(c)(1):

7 To prove the defendant "carried" a firearm during
8 and in relation to a crime of violence, the government must
9 prove that the defendant carried the firearm in the
10 ordinary meaning of the word "carry," such as transporting
11 a firearm on the person or in a vehicle. The defendant's
12 carrying of the firearm cannot be merely coincidental or
13 unrelated to the crime of violence.

14 "In relation to" means that the firearm must have
15 some purpose, role, or effect with respect to the crime of
16 violence.

17 To prove that the defendant possessed a firearm
18 "in furtherance" of the crime of violence, the government
19 must prove that the defendant possessed a firearm that
20 furthered, advanced, or helped forward that crime.

21 Affecting commerce by robbery, 18 USC,
22 Section 1951, Hobbs Act.

23 Title 18 United States Code, Section 1951(a) makes
24 it a crime for anyone to obstruct, delay, or affect
25 commerce by robbery.

1 "Robbery" means the unlawful taking or obtaining
2 of personal property from the person or in the presence of
3 another, against his will, by means of actual or threatened
4 force or violence or fear of injury, immediate or future,
5 to his person or property or anyone in his company at the
6 time of the taking or obtaining.

7 For you to find that the defendant committed this
8 crime, you must be convinced that the government has proved
9 each of the following beyond a reasonable doubt:

10 First, that the defendant unlawfully obtained
11 personal property from a person or in his presence, against
12 his will;

13 Second, that the defendant did so by means of
14 actual or threatened force or violence or fear of injury,
15 immediate or future, to his person or property, property in
16 his custody or possession, or anyone in his company at the
17 time of the taking or obtaining; and,

18 Third, that the defendant's conduct in any way or
19 degree obstructed, delayed, or affected commerce or the
20 movement of any article or commodity in commerce.

21 You should use the following instructions and
22 definitions in your deliberations regarding affecting
23 commerce by robbery under Title 18 United States Code,
24 Section 1951(a):

25 The government is not required to prove that the

1 defendant knew that his conduct would obstruct, delay, or
2 affect commerce or the movement of any article or commodity
3 in commerce.

4 It is not necessary for the government to show
5 that the defendant actually intended or anticipated an
6 effect on commerce by his actions.

7 All that is necessary is that the natural and
8 probable consequence of the acts the defendant took would
9 be to affect commerce. If you decide that there would be
10 any effect at all on commerce, that is enough to satisfy
11 this element.

12 A robbery of an individual affects interstate
13 commerce if the robbery depletes the assets of an
14 individual who is directly and customarily engaged in
15 interstate commerce, or the robbery causes or creates the
16 likelihood that the individual will deplete the assets of
17 an entity engaged in interstate commerce, or the number of
18 individuals victimized or the sum at stake is so large that
19 there will be some cumulative effect on interstate
20 commerce.

21 "Interstate commerce" means commerce or travel
22 between one state, territory, or possession of the United
23 States and another state, territory, or possession of the
24 United States, including the District of Columbia.

25 The term "personal property" includes money and

1 other tangible things of value.

2 The term "commerce" means commerce within the
3 District of Columbia; commerce within the territory or
4 possession of the United States; all commerce between any
5 point in a state, territory, or possession or the District
6 of Columbia and any point outside thereof; all commerce
7 between points within the same state through anyplace
8 outside such state; or all other commerce over which the
9 United States has jurisdiction.

10 "Affecting commerce" means that there is any
11 effect at all on interstate or foreign commerce, however
12 minimal.

13 Should you find the defendant guilty of 18 United
14 States Code, Section 924(c)(1), you will then need to
15 determine whether, in the course of so doing, the defendant
16 caused the death of a person through the use of a firearm.
17 If you so find, you must next find whether the killing is a
18 murder within the meaning of 18 USC, Section 1111. The
19 elements of murder are set forth in the subsection below.

20 Murder (first degree) 18 USC, Section 1111.

21 Title 18 United States Code, Section 1111(a),
22 makes it a crime for anyone to murder another human being
23 with premeditation in the commission, or attempted
24 commission, of certain felonies.

25 For you to find the defendant committed this

1 crime, you must be convinced that the government has proved
2 each of the following beyond a reasonable doubt:

3 First, that the defendant unlawfully killed J.S.;

4 Second, that the defendant killed J.S. with malice
5 aforethought; and,

6 Third, that the killing was premeditated.

7 You should use the following instructions and
8 definitions in your deliberations regarding murder under
9 Title 18 United States Code, Section 1111(a).

10 To kill "with malice aforethought" means either to
11 kill another person deliberately and intentionally or to
12 act with callous and wanton disregard for human life. To
13 find malice aforethought, you need not be convinced that
14 the defendant acted out of spite, hatred, malevolence, or
15 ill will toward the victim.

16 In deciding whether the killing was with malice
17 aforethought, you may consider the use of a weapon or
18 instrument and the manner in which the death was caused.

19 A killing is "premeditated" when it is the result
20 of planning or deliberation. The amount of time needed for
21 premeditation of a killing depends on the person and the
22 circumstances. It must be long enough for the killer,
23 after forming the intent to kill, to be fully conscious of
24 that intent.

25 You should consider all the facts and

1 circumstances before, during, and after the killing which
2 shed light on the defendant's state of mind, before and at
3 the time of the kill.

4 Count 19, bank theft, 18 USC, Section 2113(b).

5 The defendant is also charged in Count 19 of the
6 Fourth Superseding Indictment with the offense of bank
7 theft under Title 18 United States Code, Section 2113(b),
8 which makes it a crime for anyone to take and carry away,
9 with the intent to steal or purloin, any property or money
10 or any other thing of value exceeding \$1,000 belonging to
11 or in the care, custody, control, management, or possession
12 of any federally insured bank.

13 For you to find the defendant guilty of this
14 crime, you must be convinced that the government proved
15 each of the following beyond a reasonable doubt:

16 First, that the defendant did or did attempt to
17 take and carry away money and property belonging to or in
18 the care, custody, control, management, possession of Texas
19 Capital Bank;

20 Second, that at that time Texas Capital Bank had
21 its deposits insured by the Federal Deposit Insurance
22 Corporation;

23 Third, that the defendant did or did attempt to
24 take and carry away such money and property with the intent
25 to steal; and,

1 Fourth, that such money and property exceeded
2 \$1,000 in value.

3 The government can prove Count 19 by showing
4 beyond a reasonable doubt that the defendant did or did
5 "attempt" to commit the offense. It is a crime for anyone
6 to attempt to commit a violation of certain specified laws
7 of the United States. In this case the defendant is
8 charged in Count 19 with attempting to commit bank
9 fraud (*sic*) under Title 18 United States Code,
10 Section 1349.

11 For you to find the defendant guilty of attempting
12 to commit bank fraud (*sic*), you must be convinced that the
13 government has proved each of the following beyond a
14 reasonable doubt:

15 First, that the defendant intended to commit bank
16 theft; and,

17 Second, that the defendant did an act that
18 constitutes a substantial step towards the commission of
19 that crime and that strongly corroborates the defendant's
20 criminal intent and amounts to more than mere preparation.

21 MS. RATTAN: Your Honor, may we approach?

22 THE COURT: Yes.

23 (Sidebar conference off the record.)

24 THE COURT: Okay. Ladies and gentlemen, I'm going
25 to instruct you the statute is -- on page 32, attempted

1 bank theft is actually in violation of Title 18 United
2 States Code 2113(b). So I'm going to reread that and make
3 that change both on that B paragraph.

4 So the government can prove Count 19 by showing
5 beyond a reasonable doubt that the defendant did or did
6 "attempt" to commit the offense. It is a crime for anyone
7 to attempt to commit a violation of certain specified laws
8 of the United States. In this case the defendant is
9 charged in Count 19 with attempting to commit bank theft
10 under Title 18 United States Code, Section 2113(b).

11 For you to find the defendant guilty of attempting
12 to commit bank theft, you must be convinced that the
13 government has proved each of the following beyond a
14 reasonable doubt:

15 First, that the defendant intended to commit bank
16 theft; and,

17 Second, that the defendant did an act that
18 constitutes a substantial step towards the commission of
19 that crime and that strongly corroborates the defendant's
20 criminal intent and amounts to more than mere preparation.

21 Again, your verdict, whether it is guilty or not
22 guilty, must be unanimous. The following instruction
23 applies to the unanimity requirement as to Count 19.

24 Count 19 of the Fourth Superseding Indictment
25 charges the defendant with committing the crime of bank

1 theft in two ways.

2 The first is that the defendant committed bank
3 theft.

4 The second is that the defendant attempted to
5 commit bank theft.

6 The government does not have to prove both of
7 these for you to return a guilty verdict for Count 19; but
8 in order to return a guilty verdict, all of you must agree
9 that the same one has been proved. All of you must agree
10 that the government proved beyond a reasonable doubt that
11 the defendant committed bank theft, or all of you must
12 agree that the government proved beyond a reasonable doubt
13 that the defendant attempted to commit bank theft.

14 Now, the events presented in this trial happened
15 in various places. You are hereby instructed that when an
16 offense is begun in one district and completed in another,
17 venue is proper in any district in which the offense was
18 begun, continued, or completed.

19 In order for you to return a guilty verdict, the
20 government must prove by a preponderance of the evidence
21 that the offense began, continued, or was completed in the
22 Eastern District of Texas. This is a fact that the
23 government has to prove only by a preponderance of the
24 evidence, which means that it is more likely than not. All
25 other elements of the offense must be proved beyond a

1 reasonable doubt.

2 You should use the following instructions and
3 definitions in your deliberations on Count 19.

4 A "federally insured bank" means any bank with
5 deposits insured by the Federal Deposit Insurance
6 Corporation.

7 Should you find the defendant guilty of this
8 crime, you will then need to determine whether the
9 defendant, in committing the violation, or in avoiding or
10 attempting to avoid apprehension for committing the
11 offense, or in freeing himself or attempting to free
12 himself from arrest or confinement for the offense, killed
13 J.S.

14 Okay. To reach a verdict, whether it is guilty or
15 not guilty, all of you must agree. Your verdict must be
16 unanimous on each count of the Fourth Superseding
17 Indictment. Your deliberations will be secret. You will
18 never have to explain your verdict to anyone.

19 It is your duty to consult with one another and to
20 deliberate in an effort to reach an agreement if you can do
21 so. Each of you must decide the case for yourself, but
22 only after an impartial consideration of the evidence with
23 your fellow jurors. During your deliberations do not
24 hesitate to reexamine your own opinions and change your
25 mind if you're convinced you were wrong. But do not give

1 up your honest beliefs as to the weight or effect of the
2 evidence solely because of the opinion of your fellow
3 jurors or for the mere purpose of returning a verdict.

4 Remember at all times you are the judges, judges
5 of the facts. Your sole interest is to seek the truth from
6 the evidence in the case, to decide whether the government
7 has proven the defendant guilty beyond a reasonable doubt
8 as to each count.

9 Any notes that you have taken during the trial are
10 only aids to your memory. If your memory should be
11 different from your notes, then you should rely on your
12 memory and not on the notes. The notes are not evidence.
13 A juror who has not taken notes should rely on his or her
14 own independent recollection of the evidence and should not
15 be unduly influenced by the notes of other jurors. Notes
16 are not entitled to any greater weight than the
17 recollection or impression of each juror about the
18 testimony.

19 When you go to the jury room, the first thing you
20 should do is select one of your members as your foreperson,
21 who will help guide your deliberations and will speak for
22 you here in the courtroom.

23 A verdict form has been prepared for your
24 convenience.

25 The foreperson will write the unanimous answer of

1 the jury in the space provided for each count of the Fourth
2 Superseding Indictment, either "guilty" or "not guilty."
3 At the conclusion of your deliberations, the foreperson
4 should sign and date the verdict and use his or her
5 initials.

6 And I will be sending each of you a copy of the
7 verdict. Of course, only the foreperson will fill out the
8 one for -- to return to the Court. But this goes
9 through -- and you don't have this yet, but we'll send this
10 up to you. It just says "Verdict of the Jury." And then
11 the first one are the wire fraud counts, Counts 1 through
12 6; and then it just goes through the various questions and
13 then there are what I call hooks or instructions after each
14 question based on how you answer.

15 Like Question 1, as to the offense charged in
16 Count 1 of the Fourth Superseding Indictment, we, the jury,
17 find the defendant, Keith Todd Ashley -- there is a space
18 for guilty or not guilty.

19 And so that goes through all the various counts up
20 through Count 20, and then the last page is just -- again,
21 I want the foreperson to just initial it because we want to
22 keep your name out of the record as well.

23 Now, during your deliberations you must not
24 communicate with or provide any information to anyone by
25 any means about this case. You must not use any electronic

1 device or media, such as a telephone, cell phone,
2 smartphone, iPhone, BlackBerry, or computer; the Internet,
3 any Internet service or any text or instant messaging
4 service; or any Internet chat room, blog, or website such
5 as Facebook, MySpace, LinkedIn, YouTube, or Twitter to
6 communicate to anyone any information about this case or to
7 conduct any research about this case until I accept your
8 verdict.

9 If you need to communicate with me during your
10 deliberations, the foreperson should write the message and
11 give it to the court security officer. I will either reply
12 in writing or bring you back into the courtroom to respond
13 to your inquiry.

14 Bear in mind that you are never to reveal to any
15 person, not even to the Court, how the jury stands,
16 numerically or otherwise, on any count of the Fourth
17 Superseding Indictment until you've reached a unanimous
18 verdict.

19 And let me just give you a couple other
20 instructions. So all communications will be by note. So
21 if you have a question, you don't ask the court security
22 officer. They are super nice and want to be helpful. You
23 actually put it in a note and send it back to the Court,
24 and then I will respond in kind.

25 The other thing is when you go up to the jury

1 room, the first thing you will do will be to select one of
2 your own to be your foreperson; and that will be Note
3 Number 1 you send back to the jury. That will be Juror
4 Number 1 through 12 is the foreperson.

5 The other thing is -- is that under the law the
6 alternates cannot deliberate, so that would be Juror
7 Number 13. So you have one of two options. When you go
8 back to the jury room, you can leave. I don't make you
9 stay here. If you want to stay here, we can find you a
10 place to; but you are welcome to leave if you want to
11 leave. But, Juror 13, you are still under the same
12 instructions. You can't talk about the case with anyone
13 else because there is always a possibility you could get
14 called back.

15 If we reach a verdict, you will get notified if
16 you decide to go back home and we'll notify you and then
17 once you've been notified of the verdict, you are free to
18 talk about the case as much as you want.

19 The other thing is for the 12 of you, once you go
20 back up and just 12 of you are present, then select your
21 foreperson; and you can then begin deliberations.

22 We will also send in the exhibits. You have a
23 copy of the charge you can take with you, and we will send
24 each of you a copy of the -- the Fourth Superseding
25 Indictment be sent up. And then also I have a copy of the

1 verdict for each one of you so it's easier for you to
2 follow along. We used to only send one copy of the
3 verdict, but then after my last trial -- this is my 103rd
4 jury trial. The last jury actually asked can each of us
5 have a copy of the verdict. And so that makes sense. I
6 don't know why we've never really done that. So I'll send
7 each of you a copy of that as well.

8 The one thing to remember is if you take a break,
9 deliberations have to cease. Doesn't mean you can't
10 individually look through the evidence as you so desire;
11 but, again, all 12 of you must be present during
12 deliberations.

13 The other thing is, of course, you're going to
14 start deliberations. If we come up to the lunch hour, all
15 I need is -- you don't need my permission. If you want to
16 leave to -- just send a note saying, "We're going to leave
17 for lunch." And if you want to leave, you can leave from
18 12:00 to 1:00. Just remember all of my prior instructions
19 are still under -- you can't talk about the case or
20 anything if you-all go to lunch from 12:00 to 1:00.

21 If you want like lunch brought in, we can
22 certainly do that, too, for the 12 of you. And just send
23 that note, or you can tell -- when the exhibits are brought
24 up, you can tell them if you want lunch brought in. But if
25 we bring lunch in, the attorneys will probably be gone from

1 12:00 to 1:00. I'll give them a break during that time
2 period while you are doing a working lunch.

3 So, ladies and gentlemen, thank you for your
4 attentiveness over these seven days. You've been a great
5 jury, and I'm going to send you back to the jury room to
6 basically begin your deliberations. The case is now in
7 your hands. Thank you.

8 (The jury exits the courtroom, 9:59 a.m.)

9 THE COURT: Okay. Anything further from the
10 government?

11 MS. RATTAN: No, your Honor.

12 THE COURT: Anything further from defense?

13 MR. WHALEN: No, your Honor.

14 THE COURT: And then if you want to wait around,
15 the attorneys -- I assume we'll get a note pretty quickly,
16 if you want to know who the foreperson is. Otherwise, I
17 will -- once we get a second note, I'll put that one on the
18 record, the first note who the foreperson is. But I will
19 come out and tell you if you -- are y'all interested in who
20 the foreperson is?

21 MS. RATTAN: Yes, your Honor.

22 THE COURT: Okay. So when I get that note, I'll
23 come out. Just stay here. It shouldn't take too long.

24 And then after that, if you want to go to your
25 respective rooms; and then I'll also let you know if they

1 decide they want to go out for lunch or have lunch brought
2 in. I'll let you know that. But either way, you can take
3 12:00 to 1:00 for lunch.

4 Okay. Very good. Thank y'all.

5 (Recess, 10:00 a.m. to 10:30 a.m.)

6 (Open court, defendant present, jury present.)

7 THE COURT: Okay. We have Note Number 1, which
8 is -- they didn't identify it as Note Number 1 but -- they
9 didn't put a number on there, but I am going to add "1"
10 just so it's the first note. It's the foreperson -- any
11 guesses from the attorneys before --

12 MS. RATTAN: 4?

13 MR. WHALEN: No. I have no guess.

14 THE COURT: Okay. I'm never good at this. Juror
15 Number 1 is the foreperson.

16 MR. WHALEN: He drew the short straw.

17 THE COURT: Okay. And then I have a Note Number 2
18 that was handed to me while I was waiting here so --
19 "Question: May we have the timeline board that the U.S.
20 Attorney prepared?"

21 MS. RATTAN: Of course, we're willing to provide
22 it.

23 THE COURT: Well, that's very nice of you to be so
24 generous; but unlike the *Jordan* case, you didn't offer
25 this.

1 MS. RATTAN: We agree. We did not.

2 THE COURT: It's a demonstrative so --

3 MS. RATTAN: Yes.

4 THE COURT: I assume the defense isn't agreeing to
5 allowing that timeline to go back.

6 MR. WHALEN: No, we don't agree to that, your
7 Honor.

8 THE COURT: Okay. So I'll respond to the second
9 note that -- essentially, that the timeline board was a
10 demonstrative and not an admitted exhibit --

11 MS. RATTAN: Yes, your Honor.

12 THE COURT: -- so the Court cannot provide that to
13 you.

14 MS. RATTAN: Yes, your Honor.

15 THE COURT: Okay. She's preparing the note; and
16 while she is doing that, I did want to raise a question
17 regarding Count 19. Of course, the government pointed out
18 that on the "attempt" language, that we had the wrong
19 provision. Well, that raises the question. Under 2113(b)
20 attempt is not listed as a crime, only the completed
21 offense.

22 MS. RATTAN: Under 31, I believe, (c) of the Rules
23 of Criminal Procedure attempt is automatically inherently
24 included in every charge.

25 THE COURT: Well, but I'm saying is -- I don't

1 know that -- how does that counteract to the statute?
2 There is only -- the Circuit has -- in our quick research,
3 only one Circuit has addressed this and -- but the issue
4 of -- (a) actually provides for attempt and (d) provides
5 for that, but (b) does not.

6 MS. RATTAN: Again, I think that the Code of
7 Criminal Procedure says, under 31(c), that the charge of
8 attempt is automatically included in any crime that's
9 charged.

10 THE COURT: Okay. What rule is that again?

11 MS. RATTAN: It's procedure, 31(c), I believe.

12 THE COURT: Mr. Whalen, Rule 31 of the Criminal
13 Rules of Procedure does provide that a defendant may be
14 found guilty of any of the following:

15 One, an offense necessarily included in the
16 offense charged;

17 Two, an attempt to commit the offense charged; or,

18 Three, an attempt to commit an offense necessarily
19 included in the offense charged, if the attempt is an
20 offense in its own right.

21 MR. WHALEN: Just one moment, your Honor.

22 THE COURT: That's fine.

23 And then let me just -- so I can go ahead and send
24 the note back to the jury, the typewritten response is:

25 "Response to Jury Note Number 2: The timeline board was a

1 demonstrative and not an admitted exhibit. The Court
2 cannot provide this to you."

3 Any objection to me answering it that way is this.

4 MS. RATTAN: No, your Honor.

5 THE COURT: Mr. Whalen?

6 MR. SANDEL: No objection to that, your Honor.

7 THE COURT: Okay. I'm going to go ahead and sign
8 that and send it back to the jury with Note Number 2.

9 MR. WHALEN: Your Honor.

10 THE COURT: Yes.

11 MR. WHALEN: I don't know how to -- just -- these
12 are just my musings on it but -- 31(c) does say that, but I
13 also think why (b) doesn't have attempt in it, I guess, the
14 special issue does, when they mentioned (d). So, I guess
15 they couldn't find an attempt of (b) -- and it gets pretty
16 convoluted, but I think 31(c) does it allow it to -- they
17 can plead an attempt the way I understood it but --

18 THE COURT: So you don't think there's a -- you
19 don't think there's an issue here?

20 MR. WHALEN: It doesn't -- on its face it doesn't
21 appear to be.

22 THE COURT: Okay. Very good. I just wanted to
23 raise it while there was still a chance to -- if we had to
24 fix something, we could fix it.

25 Okay. Very good. Again -- oh, the other thing

1 I'll just let you know is the jury did ask for lunch to be
2 brought in. So the attorneys are welcome -- we're going to
3 be providing them lunch; but you are welcome to -- just if
4 you want to leave the building from 12:00 to 1:00, I've
5 already told them that, you know, they'll have a working
6 lunch and we'll be gone during that time.

7 Otherwise, we will await the jury's verdict.

8 Thank y'all.

9 (Recess, 10:37 a.m. to 11:27 a.m.)

10 (Open court, defendant present, jury not present.)

11 THE COURT: Okay. We received another note from
12 the jury and it's not numbered, but we'll number it
13 Number 3.

14 "Can we receive multiple copies of the Indictment,
15 preferably one for each juror?"

16 Of course, we sent up the redacted version, one
17 copy. If there is no objection, I'll just have Ms. McCord
18 go up and obtain the redacted version that you've already
19 signed off on and make the copies.

20 Any objection to that?

21 MS. RATTAN: No, your Honor.

22 MR. WHALEN: No, your Honor.

23 THE COURT: Okay. So I think instead of just
24 responding to the note -- I'm not going to give a written
25 response. I'll just provide -- we'll obtain that, make the

1 copies, and provide it to them.

2 Is that suitable?

3 MR. WHALEN: That's fine, your Honor.

4 MS. RATTAN: Yes, your Honor.

5 THE COURT: Okay. Very good.

6 Again we continue to await the jury's verdict.

7 Thank you.

8 (Recess, 11:28 a.m. to 1:56 p.m.)

9 (Open court, defendant present, jury not present.)

10 THE COURT: We have another note from the jury,
11 and they didn't -- they didn't put the number, but I think
12 this is Note Number 4.

13 "Would Ashley's actions in Count 9 be considered
14 wire fraud if J.S. were still alive?"

15 That is the question that they are asking. Any
16 comment from the government?

17 MS. RATTAN: I think that the Court just has to
18 instruct them that they've received the evidence and the
19 instructions and they need to focus on that and not provide
20 anything additional.

21 MR. WHALEN: I agree, your Honor.

22 THE COURT: So I would propose that we just
23 respond indicating "The Court refers you back to the
24 Court's instructions," just that.

25 Does that sound okay?

1 MR. WHALEN: That's fine, your Honor.

2 MS. RATTAN: So can we include "and the evidence
3 that you've received"?

4 THE COURT: Oh, that's fine, yes.

5 MS. RATTAN: Okay.

6 THE COURT: So "The Court refers you back to the
7 Court's Final Jury Instructions as well as all of the
8 evidence of record." Does that work?

9 MR. WHALEN: It does, your Honor.

10 THE COURT: Okay. She's going to type it up, and
11 then I'll read it one more time to make sure we're all in
12 agreement.

13 So here is my response. The typewritten note
14 says, "Response to Jury Note Number 4: The Court refers
15 you back to the Court's Final Jury Instructions and the
16 evidence of record."

17 Is that --

18 MS. RATTAN: We agree.

19 THE COURT: -- acceptable?

20 MR. WHALEN: Yeah, that's acceptable.

21 THE COURT: Okay. I will sign that and again
22 respond back to the note.

23 I did want to raise one other issue, the issue I
24 raised before regarding Count 19 and the issue of attempt.
25 I know the government asserted that criminal Rule 31(c)

1 says that attempt can be asserted in any of those counts or
2 charges. The Fifth Circuit has not ruled upon this. But
3 in our preliminary research, the Circuits that have
4 addressed it have indicated that the Rules of Criminal
5 Procedure doesn't expand upon whatever the statute says; so
6 the statute has to say that it includes attempt.

7 So if the statute says it includes attempt, then
8 Rule 31 comes into play; but it can be any of those.
9 But -- and the Fifth Circuit hasn't ruled on that but -- so
10 that could be a concern since the statute that the
11 government asserted to proceed to the jury on does not
12 provide for attempt.

13 Now, there may be some arguments about statutory
14 construction and having a look at the various provisions.
15 One thing that I'm just throwing out as a consideration is
16 if the jury convicts on Count 19, I would ask the parties
17 to ponder whether or not it is appropriate for the Court to
18 then send another -- supplemental interrogatory back to
19 find out did the jury convict him of the actual offense or
20 did they convict him of the attempt, so then we know the
21 answer. If it's the underlying offense, there is no issue.
22 If the attempt, then there is a posttrial issue we'll deal
23 with and I'm sure Mr. Whalen will raise.

24 And I know if that's the way -- I know,
25 Mr. Whalen, you agree to -- that you think there is an

1 issue; but I don't know if that's -- if attempt is not
2 statutorily authorized as a crime, then that count won't
3 survive, if the jury found him guilty on the attempt and
4 that's what they were unanimous on.

5 So any thoughts off the top of your head? I'm
6 just thinking outside the box of trying to figure out if
7 they convict, since there were two ways they could convict.
8 Only one of those is problematic but -- or possibly
9 problematic. I'm not saying definitely the answer is
10 attempt couldn't be done, but I'm just trying to note that
11 since the issue has been -- at least I have an issue about
12 it, that I would like to see if there is a way to not --
13 it's too late to fix that, but it's a way to at least find
14 out what the jury decides on that count.

15 Any thoughts?

16 MS. RATTAN: A way to address it.

17 Thank you for raising it. May we have an
18 opportunity to review it and talk about it --

19 THE COURT: Of course.

20 MS. RATTAN: -- talk about it and let the Court
21 know?

22 THE COURT: Of course.

23 Mr. Whalen, any thoughts?

24 MR. WHALEN: No, and I think that -- let me think
25 about it, but I think that could be a solution. I'm just

1 trying to --

2 THE COURT: I mean, it doesn't solve the problem,
3 you know, if they -- if we send them a supplemental
4 interrogatory and they say they found him guilty of the
5 attempt, then we'll deal with that post-trial and figure
6 out what that means.

7 MR. WHALEN: Yeah, because I think that would then
8 impact the enhancement, the special issue, possibly.

9 THE COURT: Well -- well, that goes to the
10 underlying offense, the attempt issue. If attempt is not
11 authorized, I'm not -- that's the underlying --

12 MR. WHALEN: Okay.

13 THE COURT: -- underlying substantive count before
14 the enhancement would apply.

15 MR. WHALEN: Okay. We'll think about it.

16 THE COURT: But I would ask both sides to look at
17 it and, again -- at least it gives us a way to figure out
18 did they find him guilty -- if they find him guilty of that
19 count, what was the basis so --

20 MR. WHALEN: Okay.

21 THE COURT: Okay. Very good.

22 Again, we will await the jury's verdict.

23 (Recess, 2:03 p.m. to 3:17 p.m.)

24 (Open court, defendant present, jury not present.)

25 THE COURT: I have Note Number 5 from the jury.

1 "Are we able to take a break and get fresh air, which
2 includes going outside?"

3 So I will answer them, "Yes, you are free to take
4 a break."

5 Do you want me to give them a time limit or --

6 MS. RATTAN: It seems like 30 minutes would be
7 reasonable.

8 THE COURT: Oh, you're more generous than me. I
9 was going to say 20 minutes but -- so "You are free to take
10 a 20-minute break, which means you are allowed to go
11 outside. Please remember to follow all of my previous
12 instructions."

13 Anything else you would like me to add?

14 MS. RATTAN: No, your Honor.

15 MR. WHALEN: No, your Honor.

16 I mean, my only thought would be as far as putting
17 a limit on it. I mean, it's always been their prerogative
18 of how they deliberate and how long and stuff so --

19 THE COURT: Okay. So let me just -- I'll take
20 that out.

21 So, "Yes, you are able to take a short break"?

22 MR. WHALEN: Sure.

23 THE COURT: Without defining the time.

24 Okay. So the written response is, "Response to
25 Jury Note Number 5: Yes, you are free to take a short

1 break, which means you are allowed to go outside. Please
2 remember to follow all my previous instructions."

3 Acceptable to the government?

4 MS. RATTAN: Yes, your Honor.

5 THE COURT: To defense?

6 MR. WHALEN: Yes, your Honor.

7 THE COURT: Okay. I'll go ahead and sign it.

8 Thank you. And we'll deliver that note to the
9 jury.

10 Also, as we discussed earlier -- I don't know if
11 you had a chance to discuss the issue of -- well, I think
12 you've sent an email, from the government.

13 Mr. Whalen, have you had a chance to -- well, the
14 government indicated they agreed with my general proposal
15 of a supplemental instruction.

16 MR. WHALEN: Your Honor, after reviewing it,
17 obviously the case law seems to suggest it's disfavored --

18 THE REPORTER: I'm sorry, could you --

19 THE COURT: Oh, you have to use a mic.

20 MR. WHALEN: Yes, sir.

21 In reading an opinion from the Fifth Circuit,
22 Judge Costa seemed to indicate that they were disfavored
23 but in certain circumstances they would be appropriate; and
24 I think under the circumstances that we have here today,
25 because it would lead to a potential verdict that is

1 improper, that we're not opposed to a supplemental
2 instruction.

3 THE COURT: And I'm working on the language, but
4 let me just read a draft that I've come up with. It would
5 be a supplemental question. My thought was to repeat the
6 language under Count 19. "As you were instructed, Count 19
7 of the Fourth Superseding Indictment charges the defendant
8 with committing the crime of bank fraud in two different
9 ways. The first is defendant committed bank fraud, meaning
10 the four elements listed on page 31 of the Final Jury
11 Instructions were proven by the government beyond a
12 reasonable doubt. The second is the defendant attempted to
13 commit bank fraud, meaning that the two elements listed on
14 page 32 of the Final Jury Instructions were proven by the
15 government beyond a reasonable doubt. You were instructed
16 that all of you must agree the government proved that the
17 defendant committed bank theft or that all of you must
18 agree the government proved attempted bank theft in order
19 to find the defendant guilty."

20 Then it says: "Proceed to Supplemental
21 Question 1.

22 "Supplemental Question 1: With respect to
23 Count 19, we, the jury, found the defendant, Keith Todd
24 Ashley, is guilty based on" -- and then, parentheses,
25 select only one, closed parentheses, then has "bank theft"

1 or "attempted bank theft" where they could check; and then
2 it goes to initial the verdict.

3 I'll print this. I'm making some changes. I read
4 the -- what I read to you included my changes. But how
5 does that sound generally? I'll give you a copy to look at
6 just in case we need it but --

7 MS. RATTAN: Generally, it sounds good.

8 THE COURT: Mr. Whalen?

9 MR. WHALEN: Agree, your Honor.

10 THE COURT: Okay.

11 MR. WHALEN: It sounds relatively --

12 THE COURT: So what I'll do is I'm having my
13 lawyer -- we're making a few changes, and I'll give you a
14 copy of this so you can look at and then -- just so we're
15 ready and prepared if we need it.

16 Anything further from the government?

17 MS. RATTAN: No, your Honor.

18 THE COURT: Anything further from defense?

19 MR. WHALEN: No, your Honor.

20 THE COURT: Okay. Then we will go back in recess
21 while awaiting the jury verdict. Thank you.

22 (Recess, 3:21 p.m. to 5:01 p.m.)

23 (Open court, defendant present, jury not present.)

24 THE COURT: Okay. We have Note Number 6. Of
25 course, this came about 10 minutes ago. "As we have only

1 10 minutes, can we end early?"

2 So I'm just going to instruct them that -- "Please
3 return tomorrow by 9:00 to begin your deliberations again.
4 Again, follow all of my prior instructions."

5 MS. RATTAN: Yes, your Honor.

6 MR. WHALEN: No objection, your Honor.

7 THE COURT: Okay. Okay. So here I have the
8 written response. "Response to Jury Note Number 6: Please
9 return tomorrow at 9:00 a.m. to continue deliberations.
10 Again, please follow all of my previous instructions."

11 Is that acceptable?

12 MS. RATTAN: Yes, your Honor.

13 MR. WHALEN: Yes, your Honor.

14 THE COURT: Okay. I'll sign that and send that
15 back to the jury, and then I will see y'all tomorrow
16 morning -- well, we'll await the jury's verdict but they
17 will resume tomorrow morning at 9:00 and I'll see y'all
18 tomorrow at the next note.

19 Thank y'all. Have a good evening.

20 (Proceedings adjourned, 5:02 p.m.)

21 COURT REPORTER'S CERTIFICATION

22 I HEREBY CERTIFY THAT ON THIS DATE, NOVEMBER 1,
23 2022, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD
24 OF PROCEEDINGS.

25 /s/
CHRISTINA L. BICKHAM, CRR, RDR